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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAMON RODRIGUEZ ACOSTA,

Defendant and Appellant.

G048468

(Super. Ct. No. 94SF0516)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Neil Auwarter, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

Appellant Ramon Rodriguez Acosta was convicted by jury in 1996 of a residential burglary. In addition, the court found appellant had suffered two strike priors

(Pen. Code §§ 667,¹ subds. (d) & (e)(2)(A) and 1170.12, subd. (b)), both for burglary. The court sentenced him to 35 years to life, and his conviction was affirmed on appeal, except for a review of his custody credits.

On November 6, 2012, the voters of this state enacted Proposition 36, which amended the “Three Strikes” law and enabled a prisoner serving an indeterminate sentence with two prior strike convictions to petition for resentencing if his or her current conviction was not for a serious felony conviction. Proposition 36 was enacted into law as section 1170.126.

On January 25, 2013, appellant petitioned for relief under this provision, despite the fact he was incarcerated for a crime classified as a serious felony, listed in sections 1192.7, subdivision (c)(18), and 667.5, subdivision (c). His petition was denied.

A few months later he renewed his petition under section 1385. But section 1385 explicitly abjures application to circumstances such as appellant’s: “This section does not authorize a judge to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667.” (§ 1385 (b).) The section does provide that a judge may strike punishment for priors under this statute, but provides for such action only upon its own motion or upon motion of the prosecuting attorney. That is not the case here.

Acosta appealed, and we appointed counsel to represent him. Counsel did not argue against his client, but advised this court he could find no issues to argue on appellant’s behalf. (*People v. Wende* (1979) 25 Cal.3d 436.) Counsel filed a brief which set forth the procedural history of the case, and the only conceivable appellate issue in an appeal from a denial of a petition pursuant to section 1170.126 case: the applicability of section 1170.126 to appellant.

¹ All further statutory references are to the Penal Code.

Appellant was given 30 days to file written argument in his own behalf (actually, more than 30 days because of a mistake in our clerk's office that necessitated a second 30-day filing period) if he chose to. That time has expired and no argument has been received regarding the petition for Proposition 36 relief.

Nor could it be. At least not with any chance of success. The ruling of the trial court – denying Acosta's petition because relief pursuant to section 1170.126 was not available to him – is correct. Section 1170.126 was enacted to provide relief to prisoners whose Three Strikes law commitment was based on conviction of a crime that was not serious or violent under the Penal Code. As noted above, appellant's burglary conviction is listed as a serious crime under section 1192.7, subdivision (c)(18) and as a violent crime under section 667.5, subdivision (c). And the denial of his section 1385 motion was explicitly compelled by the very section he relied upon.

That is why his attorney filed a *Wende* brief. Appellant sought relief under section 1170.126. He is not eligible for such relief and both the court below and appellate counsel recognized that fact. He then sought relief under section 1385, which explicitly bars the relief he sought. We have reviewed the record and cannot conceive of any issue that could be raised on this appeal.

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.